OHIO STATE LAW JOURNAL
Volume 38, Number 4, 1977

Shifting Currents in the Narrow Channel of State Aid to Parochial Schools

JOSHUA J. KANCELBAUM*

I. INTRODUCTION

On June 24, 1977, the United States Supreme Court decided *Wolman v. Walter*,[1] in which the validity under the establishment clause of a potpourri of Ohio statutory programs providing assistance to parochial schools[2] was at issue. Of the half dozen kinds of aid under challenge in that case, only two were struck down. The six state-funded programs at issue in *Wolman* were: textbook loans;[3] instructional equipment and materials loans;[4] speech and hearing services, and psychological diagnostic services;[5] therapeutic psychological and hearing services;[6] guidance and counseling services;[7] remedial services;[8] standardized tests and scoring;[9] programs for the disturbed and handicapped;[10] and field trip transportation.[11] Justice Blackmun delivered the opinion in *Wolman*, which spoke for the majority only insofar as it upheld diagnostic and therapeutic services and struck down equipment and materials loans and field trip transportation.

With respect to the establishment clause standards to be applied and the basis for upholding textbook loans and testing and scoring, however, the Supreme Court is utterly fragmented. The Blackmun opinion commanded the concurrences of only Chief Justice Burger and Justices Stewart and Powell. The Chief Justice noted a partial dissent,[12] and Justices Brennan,[13] Marshall,[14] Powell,[15] and Stevens[16]

* Member, Ohio Bar. Mr. Kancelbaum is a member of the firm of Berkman, Gordon, Kancelbaum and Levy, Cleveland, Ohio. The author argued *Wolman v. Walter* before the United States Supreme Court for appellants.

1. 97 S. Ct. 2593 (1977).
2. OHIO REV. CODE ANN. § 3317.06 (Page Supp. 1976).
3. *Id.* § 3317.06(A).
4. *Id.* § 3317.06(B), (C).
5. *Id.* § 3317.06(D), (F). Physicians and nursing, dental, and optometric services provided under § 3317.06(E) were not challenged by plaintiffs.
6. *Id.* § 3317.06(G).
7. *Id.* § 3317.06(H).
8. *Id.* § 3317.06(I).
9. *Id.* § 3317.06(J).
10. *Id.* § 3317.06(K).
11. *Id.* § 3317.06(L).
12. 97 S. Ct. at 2609.
13. *Id.*
14. *Id.* at 2610.
15. *Id.* at 2613.
16. *Id.* at 2614.

wrote separate opinions. A separate statement, concurring in part and dissenting in part, was filed by Justices White and Rehnquist.[17] Because *Wolman* marks the end of almost a decade of consistent defeats for new forms of grade school parochial aid,[18] the case provides a timely occasion for a look at the current condition of the first amendment law concerning aid to sectarian schools.

Despite their fragmentation, a majority of the Justices continue to apply establishment clause principles in a way that forecloses substantial government aid to almost all aspects of parochial education programs, regardless whether the aid is for core curriculum or auxiliary services and materials, and regardless whether the aid is directly to the school or channelled to the program via its pupils or their parents. Even as it continues to sharply limit available aid to parochial schools, however, the *Wolman* opinion creates new theoretical anomolies and raises serious concerns for the potential abuse of those forms of assistance now permitted. The *Wolman* opinions and the statutory programs that they addressed will be discussed in further detail after a review of the previous parochial aid decisions that led to this discordant result.

II. *Everson v. Board of Education*—THE BIRTH OF THE CHILD BENEFIT THEORY

The Supreme Court's initial foray into the jungle of parochial assistance law took it down what, in retrospect, seems to have been a doctrinal blind alley—the child benefit theory. In 1947, in *Everson v. Board of Education*,[19] the Court, in a five-member majority opinion by Justice Black,[20] upheld a New Jersey program providing publicly paid commuter transportation of pupils to and from parochial schools. The seminal *Everson* opinion, while propounding a strict adherence to the Jeffersonian concept of "a wall of separation between church and State,"[21] concluded that the statute before the Court "does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."[22]

---

17. *Id.* at 2609.

18. Board of Educ. v. Allen, 392 U.S. 236 (1968), in which textbook loans to pupils attending parochial schools were upheld, was the last Supreme Court case upholding a grade school parochial aid program.

19. 330 U.S. 1 (1947).

20. Justice Douglas, who was among the concurring members of the Court, recanted in Engel v. Vitale, 370 U.S. 421, 443 (1962) (Douglas, J., concurring).

21. 330 U.S. at 16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)). The Court had much earlier approved a state grant of textbooks to sectarian school pupils in Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930). This decision, however, preceded application of the religion clauses to the states, and only the due process considerations of assistance to a nonpublic institution were involved.

22. Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

The majority opinion in *Everson* recognized that the busing it approved approached "the verge"[23] of the state's power to constitutionally assist religious education. Justice Rutledge, however, noted in his dissenting opinion that the "social legislation" justification relied upon by the majority was a "fallacy"[24] and foresaw that "this approach, if valid, supplies a ready method for nullifying the [First] Amendment's guaranty, not only for this case and others involving small grants in aid for religious education, but equally for larger ones."[25] Twenty-one years later, Justice Rutledge's fears were realized.

III. *Board of Education v. Allen*— CHILD BENEFIT THEORY CORRUPTED

Although busing could be viewed as peripheral to the educational and religious missions of parochial schools and thus upheld on that basis,[26] the same could hardly be said of textbooks. Nevertheless, in 1968 the Supreme Court, relying upon *Everson*, upheld a New York law that required local public school authorities to lend textbooks, designated for use in public schools, to all pupils from the seventh through twelfth grades, including pupils enrolled in private sectarian schools.[27] That decision, *Board of Education v. Allen*,[28] marked the apogee of the child benefit and social welfare idea in parochial aid cases and articulated premises that would befuddle subsequent parochial aid adjudications.

Likening textbooks to bus rides, Justice White, speaking for a six-member majority, said:

> The law merely makes available to all children the benefits of a *general program* to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial *benefit is to parents and children, not to schools.*[29]

The shaky factual underpinnings for the conclusions that the program indeed involved an actual "loan," that the loan was to "pupils" and not to schools, and that the schools were not financial beneficiaries of the program, have all been thoroughly explored, both by the dissents of Justices Black, Douglas, and Fortas in *Allen* itself,[30] and by scholarly

---

23. *Id.* at 16.
24. *Id.* at 52 (Rutledge, J., dissenting).
25. *Id.* at 57.
26. *See* Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1681-83 (1969).
27. Board of Educ. v. Allen, 392 U.S. 236, 241-43 (1968).
28. 392 U.S. 236 (1968).
29. *Id.* at 243-44 (emphasis added, footnote deleted).
30. *Id.* at 250 (Black, J., dissenting); *id.* at 254 (Douglas, J., dissenting); *id.* at 269 (Fortas, J., dissenting).

review.[31] The aspect of *Allen* that was to prove most troublesome to further development of establishment clause theory, however, was the majority's unwillingness to "agree . . . either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular text books furnished to students by the public are in fact instrumental in the teaching of religion."[32]

The acceptance of the notion that the secular component of parochial education could be separated from the sectarian and thus receive governmental assistance was an irresistable invitation to state legislatures to succumb to a host of new parochial aid proposals premised on the distinction between secular and religious instruction. The ink with which that invitation was written, however, proved less than indelible.

IV. BETWEEN SCYLLA AND CHARYBDIS—THE EMERGENCE OF THE THREE-PRONGED CURRENT TEST AND THE INVALIDATION OF CONTEMPORARY PAROCHIAL AID SCHEMES

A. *Entangling Safeguards*

Board of Education v. Allen, insofar as it contained an integrated formulation of first amendment theory, applied a two-part test. This test was based on *Everson* and other earlier decisions,[33] but was first articulated in *Abington Township School District v. Schempp*,[34] which concerned religious observances in public schools. Put succinctly this test required that "to withstand the strictures of the establishment clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[35] In the year following *Allen*, however, an important third element was added to the test. In *Walz v. Tax Commission*,[36] which upheld New York's property tax exemption for religious organizations, the Court added that the result of such aid must not be "an excessive government entanglement with religion."[37] This third prong of the tripartite test, "excessive entanglement," proved critical in the Supreme Court's first confrontation with contemporary efforts by states to expand aid to the core cost of teaching secular subjects in parochial schools.

31. Freund, *supra* note 26, at 1681-83, 1685-88; Morgan, *The Establishment Clause and Sectarian Schools: A Final Installment?*, 1973 SUP. CT. REV. 57, 62-63 (1973).

32. 392 U.S. at 248.

33. *See id.* at 242-43.

34. 374 U.S. 203 (1963).

35. *Id.* at 222, *quoted in* Board of Educ. v. Allen, 392 U.S. 236, 243 (1968).

36. 397 U.S. 664 (1969).

37. *Id.* at 674. In *Walz*, the Court noted that the "test is inescapably one of degree." *Id.* It found that greater entanglement would result from abolition of property tax exemptions than from the administration of the exemptions, which created "only a minimal and remote involvement between church and state." *Id.* at 676.

In a consolidated opinion rendered in 1971, the Court considered the establishment clause validity of a Pennsylvania statute in *Lemon v. Kurtzman* and a Rhode Island statute in *Earley v. DiCenso*.[38] The Rhode Island law authorized the expenditure of state funds to supplement the salaries of teachers of secular subjects in nonpublic elementary schools by the payment of money directly to the teacher. The supplement was limited to an amount not in excess of 15% of the teacher's current annual salary, and the total compensation including the supplement could not exceed the maximum paid to Rhode Island public school teachers.[39] Participating nonpublic schools were required to submit financial data to substantiate compliance with these limits.[40] Teachers eligible for salary supplements were also required to limit their teaching to subjects taught in the public schools and to use only teaching materials used in public schools. Finally, teachers requesting the aid were required to enter into a written agreement "not to teach a course in religion" during the receipt of the supplements.[41]

The Pennsylvania statute, unlike Rhode Island's stipend to teachers, provided for payment directly to the nonpublic schools. The Commonwealth Superintendent of Public Instruction was authorized to purchase secular education services for pupils enrolled in nonpublic schools by reimbursing those schools for their actual expenditures for teachers' salaries, textbooks, and educational materials. Participating private schools were required to maintain prescribed accounting procedures and were subject to governmental audit.[42] Only specified secular subjects[43] were purchased by the state, and reimbursement for any course containing religious teaching or sectarian morals or worship was expressly prohibited.[44]

The Supreme Court found that the very efforts of Pennsylvania and Rhode Island to ensure that only the secular portion of the parochial school's curriculum received tax aid doomed both these schemes by virtue of the excessive entanglement test.[45] While according ritual deference to the observation in *Board of Education v. Allen* that "secular and religious training [were not necessarily] so intertwined that secular textbooks . . . [were] in fact instrumental in the

38. Both cases are reported at 403 U.S. 602 (1971). They will hereinafter be cited together as *Lemon v. Kurtzman*, except when necessary to refer to specific aspects of the decision on the Rhode Island statute.

39. *Id.* at 607.

40. *Id.* at 607-08.

41. *Id.* at 608.

42. *Id.* at 609-10.

43. These subjects were mathematics, science, modern languages, and physical education. *Id.* at 610.

44. *Id.*

45. The Court perfunctorily noted that these laws had a secular purpose. *Id.* at 613. It declined to consider whether the laws had a primary effect of aiding religion in view of the conclusions concerning entanglement. *Id.* at 613-14.

teaching of religion,"[46] the Court noted the extensive religious orientation that had been determined to exist in the nonpublic schools in Rhode Island[47] and alleged in the Pennsylvania complaints.[48] It agreed with the finding of the district court that the schools, overwhelmingly Catholic, "constituted 'an integral part of the religious mission of the Catholic Church.' "[49]

Beginning with the premise that such religion-pervasive institutions were capable of excessively entangling relationships with the states,[50] the Court reviewed the secularity restrictions imposed by these statutes and concluded that "[a] comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected."[51] The Pennsylvania statute was found to have the "further defect of providing state financial aid directly to the church-related school."[52] This factor was said to distinguish *Everson* and *Allen*, in which the aid was provided to the "student and his parents—not to the church-related school."[53] Finally, the opinion of the Chief Justice in *Lemon v. Kurtzman* stressed the "broader base of entanglement of yet a different character" presented by the potential of such laws to foster "political division along religious lines [that] was one of the principal evils against which the First Amendment was intended to protect."[54]

In a concurring opinion, Justice Brennan reiterated his simpler three-pronged test for evaluating state laws under the establishment clause.[55] His test evaluated whether the governmental inducements: "(a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice."[56] Brennan found that irrespective of the entangling features relied upon by the plurality, the statutes under attack failed under at least the first and third prongs.[57]

---

46. 392 U.S. at 248.

47. 403 U.S. at 613-16.

48. *Id.* at 620. Because the complaint had been dismissed in the Pennsylvania case, these allegations were accepted as true for purposes of review. *Id.*

49. *Id.* at 616. The Court further noted that "parochial schools involve substantial religious activity and purpose," *id.* (footnote omitted), and that "[r]eligious authority necessarily pervades the school system." *Id.* at 617.

50. *Id.* at 616.

51. *Id.* at 619.

52. *Id.* at 621.

53. *Id.*

54. *Id.* at 622.

55. This test was first articulated in Abington School Dist. v. Schempp, 374 U.S. 203, 294-95 (1963) (Brennan, J., concurring).

56. 403 U.S. at 643 (Brennan, J., concurring) (quoting Abington School Dist. v. Schempp, 374 U.S. 203, 294-95 (1963) (Brennan, J., concurring)).

57. 403 U.S. at 658.

Justice White agreed that the complaint in the Pennsylvania case should not have been dismissed for failure to state a claim,[58] but, because he was impressed by the Rhode Island district court's finding that "none of the teachers . . . mixed religious and secular instruction," he regarded the potential of these programs to foster religion as "an untested assumption of the Court."[59] Further, he viewed the majority's condemnation of the state's entangling efforts to insure against religious infusion as paradoxical.[60]

B. *Insufficient Safeguards*

The statutes considered in *Lemon v. Kurtzman* were unquestionably drawn with a view to satisfying first amendment considerations as then perceived by the proponents of state assistance to parochial schools. The next round of decisions concerned a simplistic effort to circumvent the obstacles to parochial aid imposed by *Lemon*. These cases were premised on the notion that, if entangling safeguards against religious infusion into secular teaching had undone the Pennsylvania and Rhode Island programs, the salvation of state aid lay in removing the safeguards. To avoid the "further defect" of direct aid,[61] the aid would be channelled to the parents of pupils and not the school.

In 1972, New York enacted measures that provided direct state grants to nonpublic schools for "maintenance and repair . . . of school facilities and equipment to insure the health, welfare and safety of enrolled pupils,"[62] and provided tuition grants[63] and state income tax relief for the parents of children enrolled in nonpublic schools.[64]

All three of these programs were struck down by the Supreme Court in *Committee for Public Education v. Nyquist*.[65] Although it again gave credence to the secularity of legislative purpose recited in the preambles to these laws,[66] the Court decried the absence of any attempt to restrict the use of the funds for strictly secular purposes.[67] The Court repeated its previous declaration that "some forms of aid

58. *Id.* at 670-71.

59. *Id.* at 666.

60. *Id.* at 668.

61. *Id.* at 621.

62. 1972 N.Y. Laws, c.414 § 1 (codified at N.Y. EDUC. LAW §§ 549-553 (McKinney Supp. 1977)).

63. 1972 N.Y. Laws, c.414 § 2 (codified at N.Y. EDUC. LAW §§ 559-563 (McKinney Supp. 1977)).

64. 1972 N.Y. Laws, c.414 §§ 3, 4 (codified at N.Y. TAX LAW § 612(c)(14)(McKinney 1975)) (amending N.Y. TAX LAW § 612(C) (McKinney 1975)); 1972 N.Y. laws, c.414 § 5 (codified at N.Y. TAX LAW § 612(j) (McKinney 1975)) (amending N.Y. TAX LAW § 612 (McKinney 1975)).

65. 413 U.S. 756 (1973).

66. *Id.* at 773.

67. *Id.* at 774, 782-83.

may be channelled to the secular [functions of parochial schools] without providing direct aid to the sectarian," but warned that "the channel is a narrow one."[68]

The only secularity restrictions contained in these New York laws were quantitative limits on the amount of aid available. The laws limited maintenance and repair of facilities and equipment to thirty to forty dollars per pupil and not more than fifty percent of the comparable public school expenditures.[69] Tuition reimbursements were limited to half the actual tuition paid by the parent.[70] Tax credits were also limited, albeit less clearly, to a fraction of the probable parental expenditure.[71] Thus, one could argue that the state paid for no more than the secular portion of the facilities and costs of attendance. The Court, however, deemed these restrictions ineffective: "[O]ur cases make clear that a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education."[72]

Looking back at *Earley v. DiCenso*,[73] Justice Powell, writing for the majority, said that although the Rhode Island fifteen percent teachers' salary supplements had been invalidated on entanglement grounds, the Court had "made clear that the State could not have avoided violating the Establishment Clause by merely assuming that its teachers would succeed in segregating 'their religious beliefs from their secular educational responsibilities.' "[74] The Court recalled the admonition of *Earley v. DiCenso* that "[t]he State *must be certain, given the Religion Clauses*, that subsidized teachers do not inculcate religion . . . ."[75] and concluded: "[O]ur cases . . . have long since foreclosed the notion that mere statistical assurances will suffice to sail between the Scylla and Charybdis of 'effect' and 'entanglement.' "[76] The Court dismissed the routing of tuition reimbursements and tax relief to parents instead of schools as "only one among many factors to be considered."[77] The key to the busing and textbook opinions in *Everson* and *Allen* was held to be the religious "neutrality" of those programs,[78] which contrasted sharply with the unrestricted character of the aid at issue in *Nyquist*.

---

68. *Id.* at 775.

69. *Id.* at 777-78.

70. *Id.* at 780.

71. *Id.* at 767 nn. 18 & 19.

72. *Id.* at 778.

73. 403 U.S. 602 (1971).

74. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 779 (1973) (quoting from Lemon v. Kurtzman [Earley v. DiCenso], 403 U.S. 602, 619 (1971)).

75. 413 U.S. at 778-79 (quoting from Lemon v. Kurtzman [Earley v. DiCenso], 403 U.S. 602, 719 (1971) (emphasis in text of *Nyquist*)).

76. 413 U.S. at 787-88.

77. *Id.* at 781.

78. *Id.* at 781-82.

Justice Powell concluded the Court's opinion by referring to the "potentially divisive political effect"[79] of such laws, but intimated that "the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decisions of this Court."[80] He relegated this factor to the status of a mere " 'warning signal' not to be ignored."[81]

The Court announced several other decisions on state aid to sectarian institutions simultaneously with *Nyquist*. Two of these decisions concerned state aid to parochial grade school education.[82] *Sloan v. Lemon*[83] invalidated a Pennsylvania tuition reimbursement plan on authority of *Nyquist*. The parents of the parochial students in *Sloan* sought to distinguish Pennsylvania's statute from the New York statute struck down in *Nyquist*. The New York statute limited the tuition reimbursement to impoverished families. The Pennsylvania statute, however, made the reimbursements available to all. Thus, the parents argued that it would not be reasonable to assume that the recipients would use the grants for religious education and therefore finance secular activities. The Court rejected this distinction.

Finally, on the day of the *Nyquist* decision, the Supreme Court, in *Levitt v. Committee for Public Education*,[84] struck down a New York law that appropriated $28,000,000 to reimburse nonpublic schools for the cost of maintaining enrollment records, health records, and other records required to be kept by the state, and the cost of administering and grading tests. The *Levitt* opinion, which was written by Chief Justice Burger, contained two themes. The first theme was that the "overwhelming majority of testing" paid under the act was "teacher-prepared" rather than state prepared.[85] The significance of this factor was that "no means are available to assure that internally prepared tests are free of religious instruction."[86] In the second theme, however, the Court also differentiated testing from permissible busing and textbooks on the basis that testing was an "integral part of the teaching process."[87] The question whether standardized state-prepared tests could be furnished was thus left open.

---

79. *Id.* at 795-96.

80. *Id.* at 797-98.

81. *Id.* at 798.

82. The other decisions, Hunt v. McNair, 413 U.S. 734 (1973) and Norwood v. Harrison, 413 U.S. 455 (1973), also decided on June 25, 1973, held respectively that a South Carolina program for bond financing of college projects was valid, and that Mississippi could not furnish textbooks to private schools under a statute that did not exclude racially discriminatory schools from the program.

83. 413 U.S. 825 (1973).

84. 413 U.S. 472 (1973).

85. *Id.* at 475-76.

86. *Id.* at 480.

87. *Id.* at 481 (quoting Committee for Public Educ. and Religious Liberty v. Levitt, 342 F. Supp. 439, 444 (S.D.N.Y. 1972), *aff'd*, 413 U.S. 472 (1973)).

As a result of the 1973 round of Supreme Court decisions it could probably be safely concluded that, with the anomolous exception of textbook loans, massive state aid to the care of parochial grade school educational costs, such as plant and salaries, was foreclosed.[88]

C. *Auxiliary Services and Materials Struck Down*

As a result of the demise of programs for funding the core of parochial education, state fringe benefits to parochial education assumed new importance. Such programs had been on the books for some time[89] but no case dealing with them reached the Supreme Court until 1974. In *Public Funds for Public Schools v. Marburger*,[90] the Court affirmed without opinion the decision of a three-judge district court that struck down New Jersey's auxiliary services program. The New Jersey legislature had authorized the state department of education to lend materials and equipment to nonpublic schools and to provide public personnel within the parochial schools for the purpose of furnishing remedial and corrective instruction, guidance counseling, and similar services.[91] Materials and equipment included such items as projectors, filmstrips, television receivers, and the like.[92]

The district court found that although the equipment and materials were "inherently neutral"[93] they could be used "with equal facility in the teaching of religious studies."[94] Providing services of teachers, although remedial, was similarly held invalid on the basis that *Lemon v. Kurtzman* had prohibited the state funding of these services.[95] The Court viewed the content of the instruction as "not entirely predictable" when delivered "within the confines and environment of a given religious institution where a religious atmosphere may be pervasive."[96]

The following year, in *Meek v. Pittenger*,[97] the Court upheld a similar Pennsylvania scheme that also contained provisions for lending

---

88. *See* Nowak, *The Supreme Court, the Religion Clauses and the Nationalization of Education*, 70 NW. U.L. REV. 883, 888 (1976); Piekarski, *Nyquist and Public Aid to Private Education*, 58 MARQ. L. REV. 247, 248, 264 (1975).

89. For example, Ohio provided auxiliary services and materials since 1967. OHIO REV. CODE ANN. § 3317.062 (Page 1972) (repealed 1975).

90. 417 U.S. 961 (1974), *aff'g* 358 F. Supp. 29 (D.N.J. 1973).

91. 358 F. Supp. at 36, 39.

92. *Id.* at 38.

93. *Id.*

94. *Id.* at 39.

95. *Id.* at 40 (citing Lemon v. Kurtzman, 403 U.S. 602, 617 (1971)).

96. *Id.* The Court also struck down a provision for reimbursing parents for the purchase of secular textbooks. *Id.* at 34-36. This program was differentiated from *Allen* principally on the basis that no similar reimbursement was offered to parents of public school pupils. *Id.* at 36.

97. 421 U.S. 349 (1975).

secular textbooks to pupils.[98] In *Meek*, Justice Stewart's majority opinion reaffirmed the vitality of *Board of Education v. Allen*[99] as support for textbook loans to pupils.[100] Thus, speculation that *Allen* could not survive the evolution of the three-pronged test proved premature, despite the invalidation of programs that seemed less inimical to church-state separation. The principles adopted by the Court to invalidate the auxiliary material and equipment sections of the Pennsylvania statute in *Meek*, however, dealt government aid to parochial schools a devastating blow.

The Court bottomed its opinion—that lending materials and equipment "has the unconstitutional primary effect of advancing religion" —on "the predominantly religious character of the schools benefiting from the Act."[101] Although the Court in *Board of Education v. Allen* had refused to conclude that "the processes of secular and religious training are so intertwined that secular textbooks . . . are . . . instrumental in the teaching of religion,"[102] a majority of the Justices were now prepared to accept that very proposition. The Court stated that "[i]t would simply ignore reality to attempt to separate secular educational functions from the predominently religious role performed by many of Pennsylvania's church-related elementary and secondary schools and to then characterize Act 195 as channeling aid to the secular without providing direct aid to the sectarian."[103]

The parochial schools of Pennsylvania were characterized in *Meek* as "religion-pervasive institutions."[104] Their very purpose was deemed to be the furnishing of "an integrated secular and religious education; the teaching process . . . to a large extent, devoted to the inculcation of religious values and belief."[105] Accordingly, the *Meek* opinion concluded that "[s]ubstantial aid to the educational function of such schools . . . necessarily results in aid to the sectarian school enterprise as a whole."[106]

Turning to the provision of the Pennsylvania law that authorized public employees to supply remedial instruction, guidance counseling, testing, and similar services[107] within parochial schools, the Court

98. *Id.* at 352-54.

99. 392 U.S. 236 (1968).

100. The textbook loan was viewed as materially "identical" to that upheld in *Allen*. The affirmance of a contrary result in *Marburger* was explained on the basis that the reimbursement there was for the "purchase" of the books, whereas books were "loaned" to public school pupils under the Pennsylvania scheme. 421 U.S. at 362 n.12.

101. *Id.* at 363.

102. 392 U.S. at 248.

103. Meek v. Pittenger, 421 U.S. 349, 365 (1975).

104. *Id.* at 366.

105. *Id.*

106. *Id.*

107. Speech and hearing diagnostic services, also provided, were considered in dictum to be probably valid as "general welfare services," but were struck down with the balance

held that the district court had erred in relying on "the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained."[108] That the services were remedial, as well as for exceptional students, and staffed by public employees was deemed to diminish, but not eliminate, the "potential for impermissible fostering of religion."[109]

Finally, in *Meek*, Justice Stewart referred to the "serious potential for divisive conflict over the issue of aid to religion," engendered by the Act,[110] as an additional basis for its establishment clause invalidity. *Meek v. Pittenger* set the stage for the resolution of the constitutionality of the Ohio statutes at issue in *Wolman v. Walter*.[111]

V. WOLMAN V. WALTER

A. *The Programs*

Section 3317.06 of the Ohio Revised Code was enacted in August 1975 in the wake of *Meek v. Pittenger* and, in the words of the *Wolman* majority opinion, was "obviously . . . an attempt to conform to the teachings of that decision."[112] Ohio's General Assembly had previously enacted a series of parochial aid measures each of which had been invalidated by the evolving Supreme Court decisions discussed above. A salary supplement law,[113] similar to Rhode Island's, had been repealed after *Lemon v. Kurtzman*.[114] This was replaced by a tuition reimbursement plan[115] that was largely abrogated in *Wolman v. Essex*.[116] The tax credit scheme[117] that was enacted to replace the tuition reimbursement program was also invalidated the next year in *Kosydar v. Wolman*.[118]

The eighty-eight million dollar appropriation that had been reallocated successively from one to another of these appropriations was then shunted to Ohio's auxiliary materials and equipment statute,[119]

---

of the auxiliary services section because the Court could not "assume that the Pennsylvania General Assembly would have passed the law solely to provide such aid." *Id.* at 371 n.21.

108. *Id.* at 369.

109. *Id.* at 371-72.

110. *Id.* at 372.

111. 97 S. Ct. 2593 (1977).

112. *Id.* at 2597.

113. Am. Sub. H.B. No. 531, § 3317.06(H), 133 Ohio Laws 2298 (repealed 1971).

114. 403 U.S. 602 (1971).

115. OHIO REV. CODE ANN. § 3317.062 (Page 1972) (repealed 1975).

116. 342 F. Supp. 399 (S.D. Ohio), *aff'd mem.*, 409 U.S. 808 (1972).

117. OHIO REV. CODE ANN. §§ 5703.052, 5747.05, and 5747.11.1 (Page 1972).

118. 353 F. Supp. 744 (S.D. Ohio 1973), *aff'd mem. sub nom.* Grit v. Wolman, 413 U.S. 901 (1973).

119. OHIO REV. CODE ANN. § 3317.062 (Page 1972) (repealed 1975).

which had been in effect and modestly funded since 1967. This statute had been upheld by the Ohio Supreme Court[120] and was essentially similar to the Pennsylvania law then under challenge in *Meek v. Pittenger*.[121] After the decision in *Meek*, however, the decision of the district court rejecting the challenge to this auxiliary services and equipment measure[122] was vacated and remanded by the Supreme Court.[123]

While the remand proceedings were pending in the district court, the 1967 auxiliary services and materials law was repealed and a new Section 3317.06 was adopted. The furnishing of auxiliary materials and services was retained, but substantially recast, and new programs were added. Two types of assistance to be furnished under the new law had already received Supreme Court approval. Textbooks were to be loaned to pupils in nonpublic schools in a manner generally similar to that upheld in *Allen* and *Meek*,[124] and services that could unmistakably be categorized as neutral health services, including "physician, nursing, dental and optometric services," were authorized to be performed by public employees working in the parochial schools.[125] The balance of the programs was without direct precedent.

"[S]ecular, neutral and nonideological" instructional materials[126] and equipment,[127] "incapable of diversion to religious use," were to be loaned to the pupils attending the nonpublic schools, or their parents, on individual request.[128] Although this device sought to avoid the direct loan to the church school condemned in *Meek v. Pittenger*, the statute permitted the equipment and materials to be stored on the parochial school premises.[129]

Services under the new Ohio law were dichotomized between "diagnostic" services, including speech and hearing diagnosis[130] and psychological diagnosis[131] on the one hand, and various therapeutic

120. Protestants and Other Ams. United v. Essex, 28 Ohio St. 2d 79; 275 N.E.2d 603 (1971).

121. 421 U.S. 349 (1975).

122. No. 73-292 (S.D. Ohio, filed July 1, 1974).

123. Wolman v. Essex, 421 U.S. 982 (1975). By consent decree, the 1967 statute was then declared invalid on authority of *Meek*.

124. OHIO REV. CODE ANN. § 3317.06(A) (Page Supp. 1976). The Ohio law also permitted the loan of a "book substitute." *Id.*

125. *Id.* § 3317.06(E). "Public health services" had been approved in dictum in Lemon v. Kurtzman, 403 U.S. 602, 616-17, as well as subsequent decisions, *e.g.* Meek v. Pittenger, 421 U.S. 349, 371 n.21 (1975).

126. OHIO REV. CODE ANN. § 3317.06(B) (Page Supp. 1976).

127. *Id.* § 3317.06(C).

128. *Id.* § 3317.06(B), (C).

129. *Id.* § 3317.06.

130. *Id.* § 3317.06(D).

131. *Id.* § 3317.06(F).

services on the other. The latter included speech and hearing therapy,[132] guidance and counseling,[133] remedial services,[134] and programs for the handicapped.[135] Although the statute permitted diagnostic services to be performed within the sectarian school,[136] the therapeutic, guidance, and remedial services and programs for the handicapped were required to be performed "in the public school, in public centers or in mobile units located off the non-public premises."[137] Testing and scoring services were provided under section 3317.06(D), but unlike those condemned in *Levitt v. Committee for Public Education*,[138] the tests were limited to "standardized" items "in use in the public schools."[139] Finally, field transportation was authorized to be furnished or contracted at public expense.[140]

B. *The Problems*

1. *The Equipment and Materials Dilemma*

The equipment and materials provisions posed an insoluble dilemma for the Court. The section of the Ohio law limiting these loans to secular material incapable of diversion to religious use added no element not already passed on by the Court.[141] The parochial parents in *Wolman v. Walter*, however, argued that nondivertible items of equipment and material were functionally indistinguishable from textbooks.[142] When textbooks were at issue, the distinction between a loan to the pupil and an outright grant had proved decisive.[143] The Court in *Wolman* was faced with the necessity of either creating a distinction of constitutional magnitude between a film strip to be viewed and a book to be read, or permitting a totally formal and ritualistic bailment to achieve exactly the result prohibited in *Meek*.

---

132. *Id.* § 3317.06(G).

133. *Id.* § 3317.06(H).

134. *Id.* § 3317.06(I).

135. *Id.* § 3317.06(K).

136. *Id.* § 3317.06(D), (F).

137. *Id.* § 3317.06(G), (H), (I), and (K).

138. 413 U.S. 472 (1973).

139. OHIO REV. CODE ANN. § 3317.06(J) (Page Supp. 1976).

140. *Id.* § 3317.06(L).

141. A similar restriction had been read into the Pennsylvania statute considered in *Meek* by the district court decision in that case, which had declared the law invalid insofar as it permitted the loan of divertible items such as projection and recording equipment. 421 U.S. at 357. This prophylaxis imposed by the district court was insufficient to save the statute before the Supreme Court.

142. Wolman v. Walter, 97 S. Ct. at 2606 n.16; Brief of Appellees James Grit et al. pp. 44-49, Wolman v. Walter, 97 S. Ct. 2593 (1977).

143. *Compare* Board of Educ. v. Allen, 392 U.S. 236 (1968), *and* Meek v. Pittenger, 421 U.S. 340 (1975), *with* Public Funds for Pub. Schools v. Marburger, 358 F. Supp. 29 (D.N.J. 1973), *aff'd mem.*, 417 U.S. 961 (1974).

2. *Other Issues*

The issues presented by the other major programs challenged in *Wolman* were less fundamental and related more to the scope and definition of the programs. Textbook loans were attacked on the basis of the statute's inclusion of "book substitutes."[144] However, the record contained assurances by the Department of Education that materials furnished would be limited to the types approved in *Meek* and *Allen*,[145] and the central thrust of the textbook challenge was a vain effort to overturn those prior decisions.[146]

The only diagnostic services challenged were "psychological" and "speech and hearing" diagnosis. The basis for that challenge was the failure of the statute or the guidelines to limit these services to objective testing procedures that would minimize opportunities for extensive interaction between public personnel and pupils on church school premises.[147]

The therapeutic services, being provided off premises, presented essentially new issues for the Court. There would appear to be nothing in the first amendment to prevent a pupil enrolled in a parochial school from leaving the school to receive health or even educational services at a public facility. Indeed, Professor Freund had commented following the *Allen* decision that "[s]hared time instruction in the public schools, treating participating parochial school children as part-time public school children" was one of the few forms of public aid to parochial schools that should be sustained.[148] Such programs might pose dangers of entanglement and abuse, but were not necessarily facially invalid.

Nevertheless, Ohio's off-premises therapeutic services presented substantial problems of what may be considered a "neutral public site" for the provision of those services. The appellants argued that such services could be provided in public schools or other sites where similar services were offered to pupils enrolled in both public and nonpublic schools as a general program.[149] However, curbside services provided by mobile units, though nominally on public property, raised the question whether a public unit stationed near a parochial school, and devoted exclusively to its student body, was truly neutral

144. OHIO REV. CODE ANN. § 3317.06(A) (Page Supp. 1976). *See* 97 S. Ct. at 2599 *and* Brief for Appellants at 53-55, Wolman v. Walter, 97 S. Ct. 2593 (1977).

145. 97 S. Ct. at 2600.

146. *Id.*; Brief for Appellants at 53-55, Wolman v. Walter, 97 S. Ct. 2593 (1977).

147. 97 S. Ct. at 2602; Brief for Appellants at 32-39, Wolman v. Walter, 97 S. Ct. 2593 (1977).

148. Freund, *supra* note 26, at 1691. This comment has been influential. *See, e.g.*, Meek v. Pittenger, 421 U.S. 349, 366 (1975); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 796 n.54 (1973); Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).

149. Brief for Appellants at 41-42; Reply Brief for Appellants at 13-14, Wolman v. Walter, 97 S. Ct. 2593 (1977).

and public; or whether such a location was vulnerable to the sectarian influences on the public staff that would prevent furnishing such services within the nonpublic schools.[150] Moreover, the use of public facilities as a site where special remedial services were provided only to pupils of sectarian institutions arguably conferred an impermissible public benefit on a sectarian class.[151]

Finally, appellants attacked the provisions for testing and scoring and field trip transportation. Appellants argued the testing and scoring provisions constituted an "integral part of the teaching process,"[152] which was invalid under the *Levitt* decision.[153] Field trip transportation was attacked as fundamentally different from commuter transportation approved in *Everson*[154] in that (1) the extent of public aid provided under this program depended on the number and length of field trips demanded by the church schools and was thus within their unilateral control, and (2) as part of the curricular program of the schools, such transportation necessarily aided the inextricably intertwined sectarian portion of the education process.[155]

C. *The Decision*

1. *Textbooks Contrasted With Equipment and Materials*

Not surprisingly, a majority of the Justices declined to overrule the textbook decision so recently reaffirmed in *Meek*.[156] However, part VII of Justice Blackmun's opinion, in which Justices Stewart, Brennan, Marshall, and Stevens concurred, flatly and opaquely refused to extend the textbook rationale to auxiliary equipment and materials, irrespective of the functional similarity between a book and any other piece of material[157] and irrespective of the similarity between the lending schemes.[158] The Court resolved the conflict between the holdings on textbooks and other instructional equipment and materials in one long footnote:

---

150. Brief for Appellants at 42-45, Wolman v. Walter, 97 S. Ct. 2593 (1977).

151. Brief for Appellants at 46-47; Reply Brief for Appellants at 13-14, Wolman v. Walter, 97 S. Ct. 2593 (1977). *See* Moore v. Board of Educ., 4 Ohio Misc. 257, 212 N.E.2d 833 (C.P., Mercer County 1965) (astounding example of a de facto merger between a public school and a church school).

152. OHIO REV. CODE ANN. § 3317.06(J) (Page Supp. 1976); Brief for Appellants at 49-50, Wolman v. Walter, 97 S. Ct. 2593 (1977).

153. *See* text accompanying notes 84-88 *supra*.

154. *See* text accompanying notes 19-25 *supra*.

155. Brief for Appellants at 51-52, Wolman v. Walter, 97 S. Ct. 2593 (1977).

156. Wolman v. Walter, 97 S. Ct. 2593, 2600 (1977). The "book substitute" argument concerning the textbook provision was dismissed as untenable in light of the separate treatment of books and other instructional items.

157. *Id.* at 2606 n.16.

158. The conclusion that the indirectness of the loan to pupils or parents did not save it was said to be "compelled" by the *Nyquist* decision on tuition reimbursement and tax relief. *Id.* at 2607.

> There is, as there was in *Meek*, a tension between this result and *Board of Education v. Allen*, 392 U.S. 236 . . . (1968). *Allen* was premised on the view that the educational content of textbooks is something that can be ascertained in advance and cannot be diverted to sectarian uses. . . .
>
> *Board of Education v. Allen* has remained law, and we now follow *as a matter of stare decisis* the principle that restriction of textbooks to those provided the public schools is sufficient to ensure that the books will not be used for religious purposes. In more recent cases, however, we have declined to extend that presumption of neutrality to other items in the lower school setting. . . . It has been argued that the Court should extend *Allen* to cover all items similar to textbooks. . . . *When faced, however, with a choice between extension of the unique presumption created in Allen and continued adherence to the principles announced in our subsequent cases, we choose the latter course.*[159]

Thus, without rationalizing, the Court baldly limited textbook holdings to their facts. These holdings remain an inexplicable anomoly in first amendment law, at least for the time being.

2. *Services*

Services fared better than equipment in *Wolman v. Walter*. Six Justices accepted the proposition that "diagnostic services, unlike teaching or counseling, have little or no educational content,"[160] thus reducing pressure for sectarian intrusion. Furthermore, because of the diagnostician's "limited contact"—principally involving objective testing—the Court said the relationship provided less "opportunity for the transmission of sectarian views"[161] and accordingly upheld speech and hearing and psychological diagnostic services.

Justice Marshall departed from the majority with respect to therapeutic services,[162] and Justice Stevens joined the majority on this point with "misgivings."[163] Five Justices, however, gave at least limited facial approval to furnishing therapeutic services away from the parochial school premises.[164] The majority acknowledged that the services were "analogous" to those condemned in *Meek*,[165] but regarded the danger in *Meek*—that public personnel might advance religious beliefs—as resulting from "the fact that the services were performed in the pervasively sectarian atmosphere of the church-related school."[166] In contrast, the Court said that "[s]o long as these types

159. *Id.* at 2607 n.18 (emphasis added, citations omitted).
160. *Id.* at 2603.
161. *Id.*
162. *Id.* at 2610 (Marshall, J., concurring in part and dissenting in part).
163. *Id.* at 2615 (Stevens, J., concurring in part and dissenting in part).
164. *Id.* at 2603-05.
165. *Id.* at 2605.
166. *Id.*

of services are offered at *truly religiously neutral locations*, the danger perceived in *Meek* does not arise."[167] Accordingly, the Court held that providing the services at neutral off-premises sites would not impermissibly advance religion because the "supervision of public employees performing public functions on public property" would obviously not amount to excessive entanglement.[168]

The Court dismissed objections to the provision for a teaching unit on a neutral site, for use only by sectarian pupils, on the basis that the establishment clause does not foreclose "a practical response to . . . logistical difficulties."[169] The majority viewed the "present posture" of the case as not presenting "any issue concerning the use of a public facility as an adjunct of a sectarian educational enterprise."[170] However, the Court based this view of the record on the district court's construction of the statute, concurred in by the majority, which authorized services "only on sites that are 'neither physically nor educationally identified with the functions of the nonpublic school.' "[171] *Wolman v. Walter* thus leaves open the question whether a particular site for the provision of services, though physically removed from the parochial school, may remain educationally identified with it.

3. *Testing and Scoring*

The standardized testing and scoring authorized by section (J) of the Act passed muster in the view of all the Justices except Brennan, Marshall, and Stevens. The majority felt that the inability of the parochial school to control the "content of the test or its result,"[172] prevented the use of the test for religious instruction and eliminated the need for excessively entangling public supervision.[173] The Court viewed the tests as serving the state's interest in assuring that minimum standards are met,[174] although the record was barren of any support for the proposition that the state monitored the scores for that or any other purpose.

The teaching process in sectarian schools is regarded as inextricably religious for purposes of providing services and materials. Despite the "integral role of . . . testing in the total teaching process,"[175]

---

167. *Id.* (emphasis added).

168. *Id.*

169. *Id.* at 2605 n.14.

170. *Id.* at 2605.

171. *Id.* (quoting Wolman v. Essex, 417 F. Supp. 1113, 1123 (S.D. Ohio 1976), *aff'd in part, rev'd in part sub nom.* Wolman v. Walter, 97 S. Ct. 2593 (1977)).

172. *Id.* at 2601.

173. *Id.*

174. *Id.*

175. Levitt v. Committee for Pub. Educ., 413 U.S. 472, 480 (1973), *quoted in* Wolman v. Walter, 97 S. Ct. at 2601 n.8.

however, the Court in *Meek* and *Wolman* considered secular knowledge severable from sectarian knowledge for testing purposes. This distinction tacitly assumes that although there is no way to prevent infusing religion into the educational content of secular courses, the state can, through testing and scoring, measure secular learning without also measuring the sectarian learning. The inconsistency in this approach, however, is that when the school authorities apply the test results for purposes of grading and evaluating students, they will necessarily employ state-furnished tests and scoring to further a course of study that the Court in *Meek* and *Wolman* declared pervasively sectarian.

4. *Field Trip Transportation*

Because the field trip transportation provisions of the Act necessitated teacher involvement and lacked restrictions on timing and destination, the Court held that field trip transportation was materially different from commuter busing in terms of the risks of fostering religion and the inability of the school authorities, without entangling supervision, to prevent religious use of field trips. Accordingly, five Justices declined to extend *Everson* to field trip transportation and struck down subsection (L) of the statute.[176]

D. *The Partially Dissenting Opinions*

Although a number of cases have greatly narrowed the permissible areas of governmental aid to parochial elementary and secondary schools, there have been sharp differences in the theoretical approaches used by the nine justices in this "extraordinarily sensitive area of constitutional law."[177] Justices Rehnquist and White dissented in *Wolman v. Walter* insofar as the case held any portion of the Ohio law unconstitutional.[178] They did so in reliance upon their separate opinions in *Meek* and *Nyquist*.[179] These Justices believe the establishment clause permits government to assist the secular portion of the parochial school curriculum, and they reject the hypothetical dangers of religious infusion as factually unsupported.

Chief Justice Burger also dissented from the opinion of the Court in *Wolman v. Walter*, with respect to instructional materials and equipment and field trips,[180] but without opinion. Justice Burger's alliance

176. 97 S. Ct. at 2608-09.

177. Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).

178. 97 S. Ct. at 2609.

179. Meek v. Pittenger, 421 U.S. at 387 (Rehnquist, J., joined by White, J., concurring in part and dissenting in part); Committee for Pub. Educ. v. Nyquist, 413 U.S. at 805 (Rehnquist, J., dissenting in part); *id.* at 813 (White, J. dissenting).

180. 97 S. Ct. at 2609 (Burger, C.J., dissenting).

with the views of Justices Rehnquist and White in *Meek v. Pittenger*[181] as well as *Nyquist*[182] make it clear that the Chief Justice also rejects the fundamental precept of *Meek* and *Wolman*—that aid to parochial school teaching necessarily involves aid to its sectarian component.

Justice Powell, although generally sympathetic to the plight of parochial schools[183] and convinced that "in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights,"[184] concurred in the judgment except with respect to field trip transportation.[185] However, Justice Powell would not have limited *Allen*, but would have permitted the lending of equipment and materials furnished for the use of "individual students and at their request."[186]

On the other end of the spectrum, Justice Brennan would have struck down the entire Ohio law on the basis of its massive funding alone, which compelled "the conclusion that a divisive political potential of unusual magnitude inheres in the Ohio program."[187] Justice Marshall agreed with the majority that diagnostic services could be furnished by public personnel in parochial school premises, but otherwise concurred with Justice Brennan.[188] Marshall's dissent emphasized the undermining effect *Meek* had upon the rationale of *Allen*, which he thought should have been overruled.[189] Justice Marshall would place the line between "acceptable and unacceptable forms of aid . . . between general welfare programs that serve children in sectarian schools because the schools happen to be a convenient place to reach the programs' target populations and programs of educational assistance."[190] Applying this test to the programs at issue in *Wolman*, Justice Marshall concluded that the diagnostic health-related programs should be upheld as general welfare programs.[191] With respect to the "therapeutic" services, however, Marshall thought that, even though they were furnished off-premises, these services "would directly support the educational programs of sectarian schools."[192] Hence, these services aided the religious mission of the school and must fall.[193]

181. 421 U.S. at 385 (Burger, C.J., dissenting in part).

182. 413 U.S. at 798 (Burger, C.J., dissenting in part).

183. Wolman v. Walter, 97 S. Ct. at 2613-14 (Powell, J., dissenting in part).

184. *Id.* at 2613.

185. *Id.* at 2614. Justice Powell regarded the majority rationale concerning state involvement in the field trip as applicable only if the state paid the teacher who conducted the outing.

186. *Id.* (quoting Board of Educ. v. Allen, 392 U.S. at 244 n.6).

187. 97 S. Ct. at 2609-10.

188. *Id.* at 2610-13 (Marshall, J., concurring in part and dissenting in part).

189. *Id.* at 2611.

190. *Id.*

191. *Id.* at 2612 & n.6.

192. *Id.* at 2612.

193. *Id.* In Justice Marshall's opinion the remedial services for the handicapped were

Justice Stevens rejected altogether the tripartite test that has been accepted by at least a plurality of the Justices. Because he believed the establishment clause must have a "fundamental character,"[194] Justice Stevens objected to any differentiation between direct and indirect aid or between textbooks and other educational materials.[195] Accordingly, he chose to revert to Justice Black's formulation in *Everson*: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."[196] In Justice Stevens' view, the "Court's efforts to improve upon the *Everson* test have not proved successful."[197]

It thus appears that Justices Stevens, Marshall, and Brennan would severely restrict parochial aid and would overrule *Allen*. Justices White and Rehnquist, and Chief Justice Burger, on the other hand, would permit large scale aid to the secular aspects of parochial education at least in the absence of excessive administrative entanglement. The present balance is struck by the positions of Justices Blackmun, Stewart, and Powell, who uneasily prefer to isolate *Allen* rather than overrule or extend it.

VI. IMPLICATIONS OF *Wolman v. Walter*

A. *The Strategic Setback*

For groups seeking to enforce the establishment clause, the most important adverse consequence of *Wolman v. Walter* would appear strategic rather than doctrinal. From *Lemon v. Kurtzman*[198] through *Meek v. Pittenger*,[199] the Court had approached parochial aid schemes broadly and facially, with a view to their potential for abuse rather than their record of abuse in fact. In effect, the state legislatures were required to guarantee that these programs would neither aid religion nor foster excessive entanglement.[200] In *Lemon*, for example, the Court held that given the "potential for impermissible fostering of

---

"clearly intended to aid the sectarian schools to improve the performance of their students in the classroom." *Id.*

194. *Id.* at 2614 (Stevens, J., dissenting in part). Justice Stevens had earlier announced his strict establishment clause views in his dissent from the approval of a program of aid to church-related colleges in Roemer v. Board of Pub. Works, 426 U.S. 736, 775 (1976) (Stevens, J., dissenting).

195. 97 S. Ct. at 2614.

196. Everson v. Board of Educ., 330 U.S. 1, 16 (1947).

197. 97 S. Ct. at 2615 (Stevens, J., dissenting in part).

198. 403 U.S. 602 (1971).

199. 421 U.S. 349 (1975).

200. This treatment contrasts with the Court's consideration of aid to church-related colleges and universities when mere possibility of unconstitutional application is insufficient to result in a judgment of facial invalidity. *See* Roemer v. Board of Pub. Works, 426 U.S. 736 (1976); Tilton v. Richardson, 403 U.S. 672, 679 (1971).

religion" the State must be "certain" that the violation does not occur.[201] Perhaps the clearest articulation of this idea appears in *Meek*:

> We *need not decide* whether substantial state expenditures to enrich the curricula of church-related elementary and secondary schools . . . *necessarily* result in the direct and substantial advancement of religious activity. For decisions of this Court make clear that the District Court erred in relying entirely on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools *to ensure* that a strictly *nonideological posture is maintained.*[202]

Placing the burden on the state to "ensure" against constitutional violation, although contrary to ordinary presumptions that a law is constitutionally valid, has been extremely important to the practical enforcement of church-state separation in educational institutions. If the secularity of the parochial aid services performed by public personnel is perverted in the implementation of the program, neither the beneficiaries of the service nor the teachers and counselors hired to provide it are apt to sound an alarm. Nevertheless, under the doctrine of *Flast v. Cohen*,[203] concerned taxpayers are entitled to complain of this misapplication of public funds even though they may not readily learn that it is occurring.

The practical result of *Wolman v. Walter* is that insofar as diagnostic and therapeutic services are now to be furnished to parochial school pupils by the government, it will be necessary to find ways to monitor the programs to discover abuses. Unlike the equal protection clause, which is often abused by clandestine patterns of discrimination unknown to the victims, the establishment clause is not protected by governmental investigative agencies seeking to ferret out unconstitutional practices.[204] The enforcement of a proper administration of these programs will thus fall to cumbersome processes of civil litigation.

The problem of assuring constitutional implementation is aggravated by the fact that these statutes, as typified by Ohio's section 3317.06, tend to be implemented almost entirely at the local school board level. In Ohio, there is no statewide control of the activities of the locally hired staff beyond periodic inspections to confirm that employees are properly performing their specialties.[205] Detailed records are not centrally collated until after the services are furnished. Consequently, the specter of multiple court tests on narrow issues of

---

201. Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

202. Meek v. Pittenger, 421 U.S. 349, 369 (1975) (emphasis added, footnotes deleted).

203. 392 U.S. 83 (1968).

204. To the contrary, the United States has sought to have these laws upheld because of their implications for the federal Elementary and Secondary Education Act. *See, e.g.*, Amicus Curiae Brief of the United States, Wolman v. Walter, 97 S. Ct. 2593 (1977).

205. Record ¶ 27, at 38, Wolman v. Walter, 97 S. Ct. 2593 (1977).

local implementation, which will involve extensive discovery, is present.[206]

In the past, parochial aid adjudications have been painted with a relatively broad brush and, if not harmonious, the adjudications at least have been clear. Hopefully, the mandate for diagnostic and off-premises services will not obfuscate that clarity.[207]

B. *Implications for Federal Aid*

Title I of the federal Elementary and Secondary Education Act of 1965[208] supplies federal funds to special programs for educationally deprived pupils in public and nonpublic schools. Although the Act does not mandate particular programs, leaving that to the state and local agencies,[209] programs such as remedial reading have been funded under it.

In *Wheeler v. Barrera*,[210] the Supreme Court declined to adjudicate the constitutionality of such programs within the parochial schools on the basis that no specific plan was before it.[211] That such programs may not be constitutionally furnished within parochial schools through federal funding would seem implicit in the Court's holding in *Meek v. Pittenger*.[212] Nevertheless, the Memorandum for the United States as amicus curiae in *Wolman v. Walter* posited the tenuous distinction that because the United States does not maintain a system of public schools open to all children, it cannot fulfill its obligation of religious neutrality without providing its benefits "to students in public and private schools alike."[213] As this article is written, the establishment clause validity of federally funded programs akin to the state programs considered in *Meek* and *Wolman* is being tested in the Southern District of New York.[214] It is difficult to believe

206. In Walz v. Tax Comm'n, 397 U.S. 664 (1970), the Chief Justice mentioned the necessity of avoiding pinning establishment clause adjudications on variable aspects to prevent "continuing day-to-day relationship" and "confrontations that could escalate." *Id.* at 674. To the extent that the churches are dragged into a multiplicity of suits, judicial entanglement may become a new church-state problem.

207. The recent abolition of the three-judge district court with its direct appeal to the Supreme Court, by which most parochial aid programs have been tested, also threatens to introduce a new source of confusion into establishment clause law by interposing new bodies of law at the intermediate appellate level. *See* 28 U.S.C. § 2281 (1970) (repealed 28 U.S.C.A. § 2284 (1978)).

208. 20 U.S.C. §§ 241a-241o (1970 & Supp. IV 1974).

209. 20 U.S.C. 241e(a)(1970); 45 C.F.R. 116a.23(d)(1976).

210. 417 U.S. 402 (1974).

211. *Id.* The Court ruled that under the Act parochial school pupils are entitled to services that are comparable, but not necessarily identical, to services furnished to public school pupils.

212. 421 U.S. 349 (1975).

213. Amicus Curiae Brief of the United States at 6, Wolman v. Walter, 97 S. Ct. 2593 (1977).

214. National Coalition for Pub. Educ. and Religious Liberty v. Califano, No. 76-888 (S.D.N.Y., filed February 25, 1976).

that the first amendment requires less separation when it speaks to the states through the fourteenth amendment.

VII. WHERE FROM HERE?

In *Meek v. Pittenger* and *Wolman v. Walter* the Supreme Court has made it clear that the parochial grade schools, as they presently exist, cannot expect to receive governmental aid for programs or material, other than textbooks and tests, for use within the sectarian schools. Although church-related colleges and universities have managed to receive such aid in forms that have been upheld against first amendment challenge by a majority of the Justices,[215] it is unlikely that the elementary and secondary parochial schools can recast themselves to meet the standards applicable to institutions of higher learning. The decisions approving aid to such institutions have dwelled upon the college student's lower susceptibility to religious indoctrination, as well as the greater departmentalization and academic freedom characteristically found in colleges and universities.[216] Even if the grade schools were to attempt greater separation of secular and sectarian functions than they have already achieved in their effort to justify government aid,[217] the susceptibility of their pupils[218] combined with a residuum of religious activity that is their *raison d'etre* would predictably defeat that effort.

The teaching of *Wolman v. Walter* with respect to off-premises therapeutic services is that at least some programs that cannot be furnished on church-school premises may be provided at a neutral location. Thus far, the sponsors of sectarian day school education have not generally sought widespread shared-time programs, presumably because removing the children to the public schools for part of their regular instruction is inconsistent with the premise of a full-time sectarian day school.[219] A danger created by *Wolman v. Walter* is that its approval of satellite facilities owned by the public, but devoted to the use of a particular parochial student body, as constitu-

---

215. *See* Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (state noncategorical grants to private colleges and universities restricted against use for sectarian purposes); Hunt v. McNair, 413 U.S. 734 (1973) (state revenue bonds to finance construction of secular facilities); Tilton v. Richardson, 403 U.S. 672 (1971) (federal grants for construction of secular academic facilities).

216. 426 U.S. at 764-66; 413 U.S. at 743-45; 403 U.S. at 680-89.

217. In *Wolman* for example, it was stipulated that religion classes usually occupied one-half hour per day, and that teachers were not required to teach religious doctrine in secular courses. 97 S. Ct. at 2598. Note also the remark of Justice Stevens that these measures have the "pernicious tendency . . . to tempt religious schools to compromise their religious mission without wholly abandoning it." *Id.* at 2615 n.7 (1977) (quoting Roemer v. Board of Pub. Works, 426 U.S. 736, 775 (1976) (Stevens, J., dissenting)).

218. "This process of inculcating religion is, of course, enforced by the impressionable age of pupils, in primary schools particularly." Lemon v. Kurtzman, 403 U.S. 602, 616 (1971).

219. *See* Freund, *supra* note 26, at 1688.

tionally acceptable sites for such services, may be viewed as an invitation to place broader shared-time programs in such special locations. This would avoid the general integration with the public school populace involved in normal shared-time programs. If this occurs it will be necessary to litigate further what is meant by "sites that are 'neither physically nor educationally identified with the functions of the nonpublic school,' "[220] and to determine whether the Court's sanction for health-oriented therapeutic services at such locations extends to educational programs that more clearly embody the religious mission of the school.

Unfortunately it is likely that, irrespective whether shared-time or some variant thereof becomes the subject of the next major thrust for government aid to religious education, there will be further efforts to circumvent *Wolman v. Walter* by more specious means—just as tax credits followed the invalidation of tuition reimbursements, and equipment loans to pupils followed the striking down of equipment loans to schools. It has been relatively inexpensive for the parochial systems to receive aid under unconstitutional laws because efforts to achieve restitution of the unlawful expenditures have not met with much success thus far.[221] Protecting the public against programs that unconstitutionally expend tax funds in aid of religious enterprises requires that, instead of merely suffering the inconvenience of having to receive aid in different forms every few years as programs are successively struck down, the beneficiaries must be required to restore the value of the unconstitutional grants. Further litigation to achieve this result appears inevitable.

VIII. CONCLUSION

The profound philosophical differences among the Justices have not prevented a unique combination of liberal and conservative mem-

220. Wolman v. Walter, 97 S. Ct. 2593, 2605 (1977).

221. *See, e.g.*, Lemon v. Kurtzman, 411 U.S. 192 (1973) (*Lemon II*), in which recovery of unconstitutional parochial aid expenditures was denied because plaintiffs failed to pursue preliminary injunction. The ability of parochial systems to receive aid under unconstitutional laws is also affected by the aspect of *Lemon II* that dealt with the permissible scope of a federal district court's injunction forbidding payments to parochial schools under an unconstitutional state statute.

In *Lemon II*, the Supreme Court affirmed the district court's denial of retroactive injunctive relief, which had the effect of allowing the parochial schools to obtain payments for expenses already incurred at the date the district court invalidated the statute. In Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973), on the other hand, the Supreme Court affirmed the district court's order permanently enjoining any payments under the New York statute declared unconstitutional in that case, including reimbursement for expenses the schools had already incurred at the time the statute was struck down. Following the Court's affirmance in *Levitt* the New York legislature enacted a statute that allowed the schools to recover expenses incurred by them prior to invalidation of the statute, which was an obvious attempt to circumvent the district court's injunction. In New York v. Cathedral Academy, 98 S. Ct. 340 (1977), the Supreme Court held the statute unconstitutional and refused to expand *Lemon II* to permit a state legislature to modify a federal district court's injunction when the equities could have conceivably justified denial of retroactive injunctive relief by the district court.

bers from applying the establishment clause to prevent public funding of religious education. Justice Stevens promises to preserve that separationist plurality, having accepted Clarence Darrow's view that, "[t]he realm of religion . . . is where knowledge leaves off, and where faith begins, and it never has needed the arm of the State for support, and wherever it has received it, it has harmed both the public and the religion that it would pretend to serve."[222]

Despite the criticisms leveled by members of the Court[223] and commentators[224] against the tripartite test, the test has served at least to isolate all but the more peripheral forms of aid to parochial schools from public funding, irrespective of the ploys and feints employed to circumvent the first amendment. The singular important exception of textbooks is now held to be unique. This disposition may be untidy, and the observation that sophisticated attempts to avoid the Constitution are just as invalid as simple-minded ones[225] emerges from *Wolman v. Walter* somewhat scathed.

---

222. 97 S. Ct. at 2614 n.1 (Stevens, J., dissenting in part).

223. *See, e.g.*, the opinion of Justice Stevens in Wolman v. Walter, 97 S. Ct. at 2614 and the opinion of Justice Brennan in Lemon v. Kurtzman, 403 U.S. 602, 642 (1971).

224. *See, e.g.*, Note, *Aid to Parochial Schools, The Test Flunks*, 52 CHI-KENT L. REV. 683 (1976).

225. Wolman v. Walter, 97 S. Ct. 2593, 2609 (1977) (Brennan, J., dissenting in part) (paraphrasing Lane v. Wilson, 307 U.S. 268, 275 (1939)); Meek v. Pittenger, 421 U.S. 349, 381 (1975) (Brennan, J., dissenting in part); Lemon v. Kurtzman, 403 U.S. 602, 641 (1971) (Douglas, J., concurring).